

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of US Telecom for Forbearance Pursuant)	
To 47 U.S.C. §160(c) to Accelerate Investment)	WC Docket No. 18-141
In Broadband and Next-Generation)	
Networks)	
)	
)	
)	

**Opposition of Access Point Inc.; BullsEye Telecom, Inc.; Matrix Telecom, LLC dba
Impact Telecom; New Horizon Communications Corp.; and Xchange Telecom LLC
("Wholesale Voice Line Coalition")**

Andrew D. Lipman
Joshua M. Bobeck
MORGAN LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004-2541
202.739.3000 (tel)
202.739.3001 (fax)
andrew.lipman@morganlewis.com
joshua.bobek@morganlewis.com

*Counsel for Access Point Inc.; BullsEye
Telecom, Inc.; Matrix Telecom, LLC dba
Impact Telecom; New Horizon Commu-
nications Corp.; and Xchange Telecom
LLC*

Dated: August 6, 2018

TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY	1
II.	THE COMMISSION MUST APPLY THE QWEST PHOENIX FORBEARANCE STANDARD TO USTELECOM’S PETITION	6
III.	SECTION 251(C) UNBUNDLING AND RESALE REMAIN NECESSARY TO ENSURE THAT CONSUMERS OF POTS RECEIVE JUST AND REASONABLE RATES AND TERMS THAT ARE NOT UNREASONABLY DISCRIMINATORY	13
A.	POTS Is a Distinct Market from Business Data Services and VoIP.....	14
B.	There is Little if any Facilities-Based Competition in the POTS Market and USTelecom’s Petition Fails to Offer Evidence Otherwise	17
C.	In Most Instances There Are Few, If Any Alternatives to Using the ILECs’ Network for POTS	18
IV.	UNBUNDLING AND RESALE ARE VITAL TO PROTECTING CONSUMERS	21
A.	Unbundling and Resale Protect POTS Customers in the Distributed Multi-Line Business Market.....	22
B.	Unbundling and Resale Protect Residential POTS Consumers	24
V.	RETAINING SECTION 251’S UNBUNDLING AND RESALE REQUIREMENTS IS CONSISTENT WITH THE PUBLIC INTEREST	25
A.	The Availability of UNEs Disciplines ILEC Rates	26
B.	The Availability of Resale Disciplines ILEC Commercial Voice Line Platform Offerings	28
VI.	THE USTELECOM/WINDSTREAM TRANSITION PLAN HARMS CONSUMERS AND COMPETITION	28
A.	The Petition is Silent Regarding Replacement Services.....	28
B.	Customers Should Not Forfeit Their Right to Manage Their Business Technology.....	30
C.	An Eighteen Month Transition is Inconsistent with Recent Transition Periods.....	31
VII.	CONCLUSION	31

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of US Telecom for Forbearance Pursuant)	
To 47 U.S.C. §160(c) to Accelerate Investment)	WC Docket No. 18-141
In Broadband and Next-Generation)	
Networks)	
)	

**Opposition of Access Point Inc.; BullsEye Telecom, Inc.; Matrix Telecom, LLC dba
Impact Telecom; New Horizon Communications Corp.; and Xchange Telecom LLC
("Wholesale Voice Line Coalition")**

Access Point Inc.; BullsEye Telecom, Inc.; Matrix Telecom, LLC dba Impact Telecom; New Horizon Communications Corp.; and Xchange Telecom LLC (collectively the “Wholesale Voice Line Coalition”) oppose the petition filed by USTelecom for forbearance from Section 251(c)(3) unbundled network element (“UNE”) and Section 251(c)(4) resale obligations (“Petition”).¹

I. Introduction and Summary

The members of the Wholesale Voice Line Coalition are CLECs that serve business customers across the United States, primarily focusing on providing “Plain Old Telephone Service” (“POTS”) — voice lines — to distributed multi-location business customers; that is, multi-location national companies and other entities that need a small number of voice lines at a large number of dispersed, often suburban, rural and remote locations. These are locations where

¹ *Petition for Forbearance of USTelecom – The Broadband Association* (filed May 4, 2018) (“USTelecom Petition”); *See also* Public Notice, *Pleading Cycle Established for Comments on USTelecom’s Petition for Forbearance from Section 251(c) Unbundling and Resale Requirements and Related Obligations, and Certain Section 271 and 272 Requirements*, WC Docket No. 18-141, DA 18-475 (rel. May 8, 2018) (“Public Notice”).

facilities-based competition with the ILEC is uneconomical for any provider, including the cable company and the ILECs who remain unable to justify fiber deployment. Some coalition members also use these POTS lines to supply emergency voice connections to building elevators and Lifeline service. In order to provide these competitive services, coalition members typically lease from the ILEC a combined package of a DS0 loop, local switching and shared transport, referred to as Wholesale Voice Platform service.²

Under certain circumstances coalition members, through their negotiated interconnection agreements entered into pursuant to Section 251, purchase DS0 UNE loops and have invested scarce capital to collocate network equipment in ILEC central offices in order to route customer traffic back to the CLEC's switch, thus providing a more customized service. Xchange Telecom LLC ("Xchange") offers UNE-L based service to thousands of residential consumers in the New York City Metropolitan Area who otherwise lacks access to affordable phone service from the incumbent telephone company or cable operator. Other CLECs incorporate DS0 loop inputs into a finished package of loop, local switching and shared transport provided over their own networks to other CLECs, including coalition members.

Coalition members also purchase resold ILEC services pursuant to the applicable discounts established under state commission pricing decisions consistent with the Commission's rules promulgated under Section 251(c)(4) of the Communications Act (the "Act").³ While resold ILEC lines may have comprised less than three percent of fixed retail connections at the end of 2016, that understates the impact of resold lines on competition in markets where POTS

² *Technology Transitions et al., Report and Order*, Order on Reconsideration and Further Notice of Proposed Rulemaking, 30 FCC Rcd. 9372, 9443-44 ¶ 132 (2015) ("*Technology Transitions Order*").

³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 15955, ¶ 908 (1996) (subseq. hist. omitted).

providers have no alternative to serving their customers. Some ILECs, for example, refuse to offer a commercial platform service at all, requiring competitors to use resale when customer locations are in sparsely populated and hard to serve areas and DS0 UNE entry would be prohibitively expensive. There are other markets where resale enables competition through a more efficient mode of entry compared to ILEC voice platform service.

USTelecom argues that forbearance is warranted due to a decrease in the number of UNE loops in use today compared to the past.⁴ But this ignores Commission precedent regarding the standard for forbearance, ignores the economic realities of facilities deployment and is flatly inconsistent with the foundations of competition policy regarding the incentives of vertically integrated companies such as the ILECs towards their wholesale customers that are also their retail competitors.

The Commission has established a rigorous standard for reviewing ILEC petitions for forbearance from the market opening provisions Congress crafted in Section 251(c).⁵ The Petition asks the Commission to abandon this complex analysis and give ILECs carte blanche to finance their expansion into other businesses through price hikes that will be passed through to customers receiving innovative, diverse and specialized services from the hundreds of CLECs that utilize 251(c) UNEs and resale as inputs in their competitive offerings. The Petition ignores the tremendous costs that consumers would bear due to the premature elimination of UNE and resale requirements. While public policy favors fiber as the “next generation” of communications

⁴ USTelecom Petition at 16.

⁵ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd. 8622 (2010) (“*Qwest Phoenix Forbearance Order*”); *aff’d*, *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012).

infrastructure, the fact that ILECs themselves have not deployed fiber throughout their footprint shows how difficult and expensive fiber deployment is.

Indeed, the Commission, beginning with the *Triennial Review Order* (“TRO”),⁶ recognized that fiber deployment would not occur uniformly across the country in 2003 and adopted a formula for ILEC relief from unbundling obligations – where the ILEC retired copper loop plant and replaced it with fiber, the ILEC’s fiber-based network, whether fiber to the premise, curb or node, would be free from the 251(c)(3) obligations applicable to the copper networks.⁷

But to the extent ILECs continue to use their copper networks — paid for by captive ratepayers during the monopoly era when ILECs received state sanctioned and protected monopolies — they would be obligated to provide CLECs with nondiscriminatory access to those networks at cost-based rates pursuant to the Commission’s judicially approved TELRIC pricing methodology.

Now the ILECs seek to get the benefit of that bargain – more regulatory relief – without holding up their end of the deal and deploying fiber networks. Any ILEC can eliminate its copper loop unbundling requirement by deploying fiber and retiring the copper – even where a

⁶ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17089 ¶ 176 (2003) (“TRO”), corrected by Errata, 18 FCC Rcd 19020 (2003), vacated and remanded in part, aff’d in part, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir 2004) (“USTA II”), cert. denied, 543 U.S. 925 (2004), on remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533 (2005) (“TRRO”), aff’d, *Covad Commc’ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006); TRO, 18 FCC Rcd. at 17216-17, ¶ 385.

⁷ *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.’s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc., Petition for Forbearance Under 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd. 21496 (2004) (“Section 271 Broadband Forbearance Order”).

CLEC is using that copper to serve customers.⁸ It would be folly for the Commission to afford ILECs even broader regulatory relief without their moving any dirt to deploy fiber.

In other words, the Commission struck a bargain with the ILECs — if you want relief from unbundling replace copper with fiber. The ILECs now want to “welsh” on their commitment to the American consumer and walk away from their commitment to deploying fiber. In 2004-05, the ILECs’ mantra was “new networks, new rules.” Now it seems to be “old networks, no rules.”

The ILECs urge this relief despite the fact that there are swaths of the country where services provided using UNEs and resale are the only viable competition to the ILEC. Deregulating the ILEC’s wholesale obligations to provide UNEs would allow vertically integrated ILECs — as the only wholesale and retail provider in the market — to increase prices for the wholesale inputs competitors must have to serve customers. CLECs will inevitably have to pass those rate increases on to their consumers who will soon migrate back to the ILEC. Consistent with long held economic theory once the ILECs have wiped away the competition they will be free to raise retail prices with impunity.

The Commission must not grant USTelecom’s petition leaving these customers without competitive choices.

USTelecom’s petition fails to acknowledge that there is no available substitute for the DS0 loop. Compounding this defect, the petition is devoid of details regarding any replacement commercial services and prices the ILECs plan to make available if the petition is granted.

⁸ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rule-making, 32 FCC Rcd. 11128 (2017).

Absent this information it is impossible for the Commission to conduct a meaningful cost-benefit analysis.⁹

The Commission should deny the Petition.

II. The Commission Must Apply the Qwest Phoenix Forbearance Standard to USTelecom’s Petition

Congress adopted Section 251(c) to foster competition without requiring competitors to duplicate the ILEC network in markets where such duplication was not economic.¹⁰ “Congress wanted to enable entry by multiple competitors through the use of the [ILECs’] network” and evidence of “robust competition” is required to forbear from “Congress’ imposition of unbundling obligations as a tool to open local telephone markets to competition.”¹¹ USTelecom’s proposed forbearance from Section 251 unbundling and resale obligations would *not* promote “competitive market conditions,”¹² but would instead inhibit competition and harm consumers.

USTelecom “bears the burden of proof – that is, of providing *convincing analysis and evidence* to support its petition for forbearance.”¹³ The Petition fails to meet this burden. The

⁹ See *In the Matter of Establishment of the Office of Economics and Analytics*, Order, 33 FCC Rcd. 1539 (rel. Jan. 31, 2018) (establishing the Office of Economics and Analytics to provide rigorous economic analysis for rulemakings and other Commission actions), Statement of Chairman Ajit Pai, 33 FCC Rcd. at 1549 (stating that “cost-benefit analysis allows [the Commission] to intelligibly apply [the public interest standard]”), Statement of Commissioner Michael O’Rielly 33 FCC Rcd. at 1551 (stating that a cost-benefit analysis must be “credible and accurate”), Statement of Commissioner Brendan Carr, 33 FCC Rcd. at 1553 (supporting codification of “a renewed commitment to the role that economic analysis should play in [the Commission’s] decision-making”).

¹⁰ *BellSouth Telecomms., Inc. v. Southeast Tel., Inc. and Kentucky P.S.C.*, 462 F.3d 650, 652 (6th Cir. 2006).

¹¹ *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. at 8638, ¶ 32.

¹² 47 U.S.C. § 160(b); *Qwest Phoenix Forbearance Order* 25 FCC Rcd. at 8674, ¶ 104.

¹³ *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act*, Report and Order, 24 FCC Rcd. 9543, 9554, ¶ 20 (2009) (emphasis added) (*Forbearance Procedural Requirements Order*).

Commission may grant forbearance only when the Petitioner demonstrates that “(1) enforcement of such regulation ... is not necessary to ensure that the charges ... in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement ... is not necessary for the protection of consumers; and (3) forbearance ... is consistent with the public interest.”¹⁴ This analysis “consider[s] whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”¹⁵ The Petition would end the UNE-based competition the Commission relied on to justify relaxed regulation of numerous services, deprive consumers of the benefit of competition, and increase prices. The Petition fails the test and the Commission should deny it.

Competition remains the most effective means of ensuring that charges are just and reasonable and not unreasonably discriminatory.¹⁶ In the *Qwest Phoenix Forbearance Order*, the Commission evaluated Qwest’s market power to gauge whether sufficient competition existed to ensure prices would remain just and reasonable if it granted forbearance.¹⁷ Under the *Qwest Phoenix* standard, a petitioner could show sufficient facilities-based competition in the wholesale

¹⁴ 47 U.S.C. § 160(a).

¹⁵ 47 U.S.C. § 160(b).

¹⁶ See *Business Data Services in an Internet Protocol Environment*, Report and Order, 32 FCC Rcd. 3459, 3516, ¶ 124 (2017) (“*BDS Order*”); see also *Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions Between Competitive Local Exchange Carriers and Cable Operators; Conditional Petition for Forbearance From Section 652 of the Communications Act for Transactions Between Competitive Local Exchange Carriers and Cable Operators*, Order, 27 FCC Rcd. 11532, 11544, ¶ 27 (2012) (quoting *Petition of U S WEST Communications Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of U S WEST Communications, Inc., for Forbearance; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, Memorandum Opinion and Order, 14 FCC Rcd. 16252, 16270, ¶ 31 (1999)).

¹⁷ *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. at 8645-47, ¶¶ 41-43.

market or from “a number of significant, full facilities-based competitors providing the relevant retail services.”¹⁸ But the Commission made clear that forbearance would be denied where the ILEC “either individually or in conjunction with a small number of firms, could profitably sustain supracompetitive prices.”¹⁹ Dissenting from the *2015 Open Internet Order*, then-Commissioner Pai stated that under the Act’s forbearance standard the Commission “must identify something else [other than an economic regulation] that will constrain pricing, and that something else has always been—and can only be—competition.”²⁰

The determination of whether continued enforcement of a regulation is “not necessary for the protection of consumers” tracks the competitive analysis.²¹ In the *2015 USTelecom Forbearance Order*, the Commission declined to forbear from Section 272 obligations because “[t]o the extent these obligations remain necessary to guard against unreasonable or unreasonably discriminatory rates or practices in the provision of access services to long distance competitors, they are also necessary to protect consumers of long distance services.”²²

Finally, in making the Section 10 public interest determination, the Commission must consider whether forbearance will promote competitive market conditions, including among

¹⁸ *Id.* at 8647, ¶ 43.

¹⁹ *Id.*

²⁰ *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601, 5978 (2015) (dissenting Statement of Comm’r Pai).

²¹ *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. at 8671, ¶ 92; *See also* *Petition of NTCA—The Rural Broadband Association and the United States Telecom Association for Forbearance Pursuant to 47 U.S.C. § 160(c) from Application of Contribution Obligations on Broadband Internet Access Transmission Services*, Order, FCC 18-75, ¶ 9 (rel. June 8, 2018).

²² *Petition of USTelecom for Forbearance Pursuant to 47 U.S. C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks*, Memorandum Opinion and Order, 31 FCC Rcd. 6157, 6181, ¶ 44 (2015) (“*2015 USTelecom Forbearance Order*”).

providers of telecommunications services.²³ After finding that the first two prongs of the forbearance analysis were met for certain BDS, the Commission said that “those same considerations, plus [the] desire to promote competition and broadband deployment, likewise persuade [the Commission] that ... forbearance is in the public interest.”²⁴ The Commission’s consideration of all three prongs of the Section 10 forbearance analysis seeks to “balanc[e] short-term competitive effects and future developments.”²⁵

The Commission must engage in a rigorous analysis of competition “by defining the relevant product and geographic markets”²⁶ and “examining whether there are any carriers in those markets that, individually or jointly, possess significant market power.”²⁷ USTelecom bears the burden of proving that forbearance is warranted through “convincing analysis and evidence.”²⁸ USTelecom’s request for forbearance from the remaining legacy unbundling obligations implicates both wholesale and retail markets. Yet it has not defined the relevant product markets, explained why it would be reasonable for the FCC to define the relevant geographic market as “national,” or shown that ILECs lack significant power in each relevant market.

Because USTelecom has not met its burden, the Commission should deny the Petition. Rather than ending a critical option to facilitate market-entry upon which competitors (and their customers) continue to rely, USTelecom’s members should (1) deploy fiber if they want to end their unbundling obligations in a local market or (2) file petitions with state public utility/service commissions if they believe UNE pricing levels should be adjusted.

²³ 47 U.S.C. § 160(b).

²⁴ *BDS Order*, 32 FCC Rcd. at 3531, ¶ 159.

²⁵ *EarthLink, Inc. v. FCC*, 462 F.3d 1, 6 (D.C. Cir. 2006).

²⁶ *Qwest Phoenix Forbearance Order*, 15 FCC Rcd. at 8646, ¶ 42.

²⁷ *Id.* at 8632, ¶ 21.

²⁸ *Forbearance Procedural Requirements Order*, 24 FCC Rcd. at 9554, ¶ 42.

Commission precedent makes clear—and ILECs have previously agreed²⁹—that forbearance from legacy unbundling obligations are subject to a market-by-market review. As the Commission stated, “[a] different [nationwide] analysis may apply when the Commission addresses advanced services, like broadband services, instead of a petition addressing legacy facilities.”³⁰ Because USTelecom seeks forbearance from legacy UNE obligations, the nationwide analysis is not appropriate here.

USTelecom’s reliance on forbearance orders that utilized a nationwide framework is misplaced.³¹ Contrary to USTelecom’s implication, the *BDS Order* evaluated competition on a geographic market-by-market basis looking to a half-mile radius of a location with BDS demand and categorizing county-sized markets as competitive or non-competitive. The *BDS Order* finds that a relevant geographic market is where consumers can turn for alternative sources and within which providers can reasonably compete.³² Small business and residential customers do not look nationally to identify their service provider for POTS, instead they look to the carrier that can deliver it to the specific locations where they have the need for service.

The Commission’s decisions adopting a nationwide market analysis were largely limited to *broadband* elements (as opposed to legacy network elements), relied on price-regulated alternatives to “backstop” forbearance, or relied on other nationwide regulatory reforms to constrain incumbents’ ability to drive up prices. Because these deregulatory decisions relied on

²⁹ See Reply Comments of Verizon Comments, WC Docket 14-9, at 7 (filed July 14, 2014) (stating that *Qwest Phoenix Forbearance Order* “concerned legacy TDM services and does not apply to broadband services”); Comments of AT&T Services, Inc., WC Docket 14-9, at 4 (filed July 7, 2014) (stating that “high-capacity broadband packet-switched and optical services” implicate the Commission’s Section 706 broadband deployment goals compared to legacy TDM-based services).

³⁰ *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. at 8644, ¶ 39.

³¹ USTelecom Petition at 2, n.3.

³² *BDS Order*, 32 FCC Rcd. at 3479, ¶ 39.

availability of price-regulated Section 251 UNEs to discipline the commercial offering of services, forbearance from Section 251 unbundling and resale obligations would be inconsistent with those decisions.

For example, the *Section 271 Broadband Forbearance Order* only addressed Section 271 obligations for broadband elements that were no longer UNEs.³³ Similarly, the *Enterprise Broadband Order* limited forbearance to ILECs' specific non-TDM broadband services provided to retail enterprise customers with national, multi-location operations (*e.g.*, optical network services, wave-based services, frame relay services, ATM services, LAN services, Ethernet-based services, and video transmission services). The Commission's analysis focused on the impact of dominant carrier rules on the ILEC's ability to compete for enterprise customers with national, multi-location operations.³⁴ The Commission found that dominant carrier regulations inhibited AT&T from responding quickly to customers' demands for innovative service arrangements tailored to each customer's individualized needs.³⁵ The Commission recognized that the broadband services for which AT&T sought relief were purchased predominantly by enterprise customers (*i.e.*, they were retail services), not their competitors as wholesale inputs.³⁶ The Commission found that "competition for these enterprise broadband services tends to be based

³³ *Section 271 Broadband Forbearance Order*, 19 FCC Rcd. 21496, 21502, ¶ 12.

³⁴ *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules With Respect to its Broadband Services, Petition of BellSouth Corp. for Forbearance Under 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules With Respect to its Broadband Service*, 22 FCC Rcd. 18705, 18718, ¶ 21, n. 86 (2007) ("*Enterprise Broadband Forbearance Order*").

³⁵ *Id.* at 18725, ¶ 33.

³⁶ *Id.* at 18718, ¶ 21, n. 90 (noting that granting forbearance "will not affect" the ability for competitors who purchase wholesale inputs to obtain traditional DS1 and DS3 special access services or UNEs as inputs or affect their ability to self-deploy OCN facilities and services or to obtain them from non-incumbents).

on either competitive deployment of facilities or use of special access inputs”³⁷ and limited forbearance to packet-switched services and non-TDM-based services.³⁸

In contrast, UNEs are legacy network elements purchased by ILECs’ competitors and used primarily for SMB customers or by distributed multi-location business customers for serving locations with limited demand for telecommunications service. Although the Commission can “reasonably tailor its analysis to the situation at hand,” CLECs use UNEs and resale to serve locations that are very different from the large, multi-location enterprises that were at issue in the *Enterprise Broadband Forbearance Order*.

Nor does the *2015 USTelecom Forbearance Order* justify deviating from the market based analysis the Commission established in the *Qwest Phoenix Forbearance Order*. The 2015 Order relied on the retention of Section 251 requirements and other regulations³⁹ acting as “backstops” and the fact that the 271 obligations were superfluous in light of Section 251.⁴⁰ While this order also eliminated the Section 251 requirement to provide a 64 kbps channel for voice, there was nominal demand (nowhere near the 2 plus million UNE loops in service), and the ILECs were required to grandfather existing arrangements.⁴¹ In contrast, there is a continued and substantial competitor demand for loop unbundling. Although nationwide UNE demand may

³⁷ *Id.* at 18716-17, ¶ 20.

³⁸ *Id.* at 18716-17, n.4 (noting that “all traditional, TDM-based DS1 and DS3 services and all services that do not provide a transmission capability of over 200 kilobits per second in each direction” were excluded from forbearance).

³⁹ *2015 USTelecom Forbearance Order*, 31 FCC Rcd. at 6169, ¶ 8 (expecting that “the substantive section 251 obligations will continue to be enforced through interconnection agreements and complaints filed under section 203 of the Communications Act)

⁴⁰ *Id.* at 6172-73, ¶ 7 (stating that “there is ... no evidence in the record that competitors are providing services through unbundled loops, transport, or databases and signaling specifically available under the independent checklist obligations”).

⁴¹ *Id.* at 6194, ¶ 66.

have decreased,⁴² to evaluate the impact on consumers under the statutory standard, the Commission must analyze the impact of resale UNE-based competition in each local market and USTelecom has provided no such market-by-market evidence.

The *2016 Switched Access Non-Dominance Order*, is likewise inapplicable here since the Commission granted forbearance due to “changes to the regulatory structure of interstate switched access that are largely independent of [competitive] trends [and] is not dependent on the extent of competition among geographic and product markets for retail voice services.”⁴³ Unlike switched access regulation, no comprehensive regulatory overhaul is at issue and thus the *Switched Access Non-Dominance Order* cannot support departure from Qwest Phoenix market-based analytical framework.

III. Section 251(c) Unbundling and Resale Remain Necessary to Ensure that Consumers of POTS Receive Just and Reasonable Rates and Terms that are not Unreasonably Discriminatory

USTelecom bears the burden of demonstrating why and how rates would remain just and reasonable after forbearance. It cannot “turn[] the first part of the forbearance test in Section 10 completely on its head by creating a presumption that rates will remain just and reasonable until an injured party demonstrates otherwise.”⁴⁴ USTelecom admitted that rates will rise following forbearance when it proposed a transition framework that would have raised rates on CLECs by

⁴² USTelecom Petition at 16.

⁴³ *Technology Transitions, USTelecom Petition for Declaratory Ruling That Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services, Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers*, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, 31 FCC Rcd. 8283, 8293, ¶ 29 (2016) (“*Switched Access Non-Dominance Order*”).

⁴⁴ Opposition of SBC Communications Inc., at 24, WC Docket No 03-266 (filed March 1, 2004) (“SBC Level 3 Forbearance Opposition”).

up to 15 percent immediately.⁴⁵ Although USTelecom has since reached a “compromise” with Windstream to prohibit price increases before February 2021, the Commission should not ignore the context provided by USTelecom’s candid request for authorization to increase the prices it charges wholesale customers immediately following forbearance. UNE rate increases would inevitably result in higher retail rates as competitors pass those increased wholesale costs to retail customers.

While USTelecom fails to provide evidence of facilities-based competition for POTS service in any specific geographic market, and that alone disqualifies the Petition, there is ample evidence supporting denial of the petition.

A. POTS Is a Distinct Market from Business Data Services and VoIP

In defining the relevant markets, the Commission considers whether services are “reasonably substitutable” to determine an appropriate product market, and in the case of geographic markets [it] look[s] to areas in which the seller operates and to which the purchaser can practically turn for supplies.”⁴⁶ The Commission recognizes that “inherent differences” between services (such as providing different functionalities and being tailored to serve different consumer needs) may warrant evaluating services separately despite some similarities between them.

The *BDS* proceeding recognized that service to multi-location customers likely represents a distinct product market based on customers’ requirements, observing that “carriers organize how they market around distinct fairly similar customer groups,” based on “distinct characteristics, and hence distinct service requirements.”⁴⁷

⁴⁵ USTelecom Petition at 44.

⁴⁶ *BDS Order*, 32 FCC Rcd. at 3468-69; 3479, ¶¶18-19, 39.

⁴⁷ *Business Data Services in an Internet Protocol Environment Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform*

As an initial matter, it is well recognized that no single carrier will own network facilities reaching every potential location at which its customers request service. Although this is the case, “multi-location customers often prefer to work with a single provider.”⁴⁸ Because “no provider has facilities in every location,” it is necessary for providers seeking to serve such customers to obtain facilities from other providers by contract.⁴⁹

This is plainly the case with respect to the distributed multi-location business customers CLECs serve via DS0 UNE loops, resale and the Wholesale Voice Platform. The *BDS* proceeding explains that “spread-out” multi-site customers “may be sufficiently distinct from other customers to constitute a separate market,” especially to the extent that they are located “in areas with lower business densities” and “may not face the same competitive choices as other customers.”⁵⁰ The Commission found that “competitive supply to other customers may not place a competitive constraint on supply to these ‘spread-out’ multi-site customers.”⁵¹ While distributed multi-location business customers POTS customers are a product market distinct from the market for multi-location BDS, POTS customers have the same need for the benefits of competition.

There is however, less competition for POTS than BDS. Revenues available for BDS at a location are higher than revenue available for POTS at the same location. Thus locations with demand for BDS are more attractive to competitors looking to expand their fiber-based networks to offer BDS. In the *BDS* proceeding, the Commission acknowledged that “competition remains

Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 4723, 4810, ¶ 199 (2016) (“*BDS FNPRM*”).

⁴⁸ *Id.* at 4923, Appx. B, Empirics of Business Data Services, White Paper, Dr. Marc Rysman (April 2016).

⁴⁹ *Id.*

⁵⁰ *Id.* at 4812, ¶ 201.

⁵¹ *Id.*

stubbornly absent from other places and different products (most notably low bandwidth services)”, such as the few lines of voice service per location used by CLECs leasing platform services.⁵²

To the extent that USTelecom asserts that competition for voice services from cable and wireless offerings support finding that existing competition justifies forbearance, USTelecom fails to understand the dynamics of the current marketplace and conflates “voice service” and POTS (which customers continue to use for communications that are not merely “voice” communications). VoIP, whether facilities-based cable or over-the-top, is not a substitute for POTS. For example, Xchange provides POTS service to buildings in New York for use as an emergency line in elevators and the state prohibits such lines from using standard VOIP connections.⁵³ POTS remains a distinct product market that must be separately analyzed when determining whether sufficient competition exists to forbear from legacy unbundling obligations that would implicate POTS. The Commission has declined to recognize wireless as a substitute for POTS as recently as the February 2018 Voice Telephone Services Report.⁵⁴ Nor is wireless voice service a reliable substitute for POTS used for fax, elevator and/or alarm services because, unlike mobile services, copper lines do not require a separate power source.

⁵² *Id.* at 4725, ¶ 3; *see also id.* at 4791, ¶ 160 (“an end user’s competitive choices generally fall as the number of locations where it needs connectivity rises, as the number of those locations that are found in areas with less dense BDS demand rises, and as the end user’s demand for ...lower bandwidth BDS rises”).

⁵³ *See* Technical Bulletin, Fire Alarm Signal – FCNYS Section 907/BCNYS Section 907, New York State Department of State, Division of Code Enforcement and Administration (Dec. 28, 2010).

⁵⁴ Voice Telephone Services Report: Status as of December 31, 2016, Industry Analysis Technology Division Wireline Competition Bureau, n. 3 (rel. Feb. 2018) (stating that “presentation of mobile wireless telephone subscriber counts in this report does not constitute, or imply, Commission analysis of the extent to which wireline and mobile wireless telephone services are demand substitutes or complements in general or any particular situation”).

B. There is Little if any Facilities-Based Competition in the POTS Market and USTelecom's Petition Fails to Offer Evidence Otherwise

The *BDS* proceeding did not examine the level of competition for POTS lines, although the Commission acknowledged generally the substantial barriers faced by carriers in deploying facilities.⁵⁵ Further, the Commission has acknowledged that the transition from TDM to IP does not reduce those barriers.⁵⁶

The competitive effects of these barriers are evident in the existing POTS market. The Commission has observed, for example, that “an end user’s competitive choices generally fall as the number of locations where it needs connectivity rises, as the number of those locations that are found in areas with less dense ... demand rises, and as the end user’s demand for higher-quality and lower-bandwidth [service] rises.”⁵⁷ Similarly, fiber is most commonly deployed in heavily populated parts of large urban metropolitan areas “where the concentration of potential customer locations – and thus of revenue opportunities – is very dense.”⁵⁸ Frequently, building fiber to a location with a single customer is financially unfeasible and inefficient for competitive providers.⁵⁹

⁵⁵ *BDS FNPRM*, 31 FCC Rcd. at 4822-23, ¶¶ 224-225; *BDS Order*, 32 FCC Rcd. at 3483 ¶ 48 (recognizing that competitors make investments to provide BDS “in areas of significant demand”).

⁵⁶ *Id.* at 4824, ¶ 226.

⁵⁷ *Id.* at 4791, ¶ 160.

⁵⁸ *TRRO*, 20 FCC Rcd. 2533, 2618, ¶ 154 (2005).

⁵⁹ *See id.* at 2616, ¶ 150 (the economics of deploying loops are determined by the costs associated with such deployment and the potential revenues that can be recouped from a particular customer location”); at 2619 ¶ 154 (CLECs building competitive networks “target areas that offer the greatest demand for high-capacity offerings (i.e. that maximize potential revenues”); *See also TRO*, 18 FCC Rcd. at 17032, ¶ 77 (competitor’s decision to enter the market “depends on whether the revenues it expects to obtain exceed the costs of entering and serving the market”).

These same barriers exist at locations the Coalition typically serves, but the revenues available from providing POTS are far lower than for serving even demand for DS1 BDS and far too insignificant to justify facilities investment. Granite, for example, in earlier proceedings, submitted data showing that approximately 75% of its locations were single customer locations.⁶⁰

It is thus evident that there is little chance of facilities-based competition disciplining ILEC market power in the POTS market. Without a regulatory backstop there is little basis to conclude that the ILECs will not take the opportunity to exercise that market power by excluding competition and extracting monopoly rents. Absent competition from CLECs using ILEC provided wholesale inputs (including UNEs and resale), customers in these markets will face higher prices and reduced quality service.

C. In Most Instances There Are Few, If Any Alternatives to Using the ILECs' Network for POTS

The transition from TDM to IP does not alter the economics of deploying competitive networks to serve the relatively low bandwidth locations such as those that the members of the Coalition serve. The Commission has recognized that all competitors, including cable companies, “face extensive economic barriers” to the deployment of competitive facilities needed to serve the customer.⁶¹ The significant barriers to competitive deployment to such locations do not disappear simply because the network protocol changes from TDM to IP. Given the limited demand for services in most of the locations where the Coalition’s customers are located, there is little justification for competitive fiber deployment.

⁶⁰ Ex Parte Letter from Thomas Jones, Counsel for Granite Telecommunications, LLC to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., Attachment at 4 (filed June 3, 2015) (“Granite June 3, 2015 Ex Parte”).

⁶¹ See, e.g., *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. at 8670 ¶ 90.

As indicated above, many of the locations served by CLECs using DS0 UNEs and resale (as well as the wholesale platform) are located in areas outside the central business districts where most competitive networks are deployed.⁶² These locations are frequently single tenant buildings such as gas stations, convenience stores or fast food restaurants that are not located in multi-tenant buildings that large fiber operators often compete to serve.

Further, most of the business locations that the Coalition members serve are not in residential areas where cable companies often focus deployments, while wireless-based services lack the features and reliability necessary for business operations in many locations. Compounding the problem, the telecommunications needs of the Coalition's customers at these locations are modest. As Granite explained, over half of its locations require five or fewer voice lines.⁶³ The same is generally true for the members of the Coalition. Neither cable companies fiber providers are likely to undertake the time consuming and costly process to build fiber to a location with a single customer to provide four voice lines.⁶⁴ The monthly recurring revenue will be insufficient to recoup the capital costs of deploying fiber and the risk of losing that investment is significant

⁶² See, e.g. *TRRO*, 20 FCC Rcd. at 2618, ¶ 154 (noting that CLECs deploy fiber in densely populated parts of large urban metropolitan areas "where the concentration of potential customers locations - and thus of revenue opportunities - is very dense").

⁶³ Granite June 3, 2015 *Ex Parte*, Attachment at 4.

⁶⁴ See *BDS Order*, 32 FCC Rcd. at 3485 ¶ 57 (finding that "cable companies have focused investment on building fiber networks for higher-bandwidth Ethernet services;") *TRRO*, 20 FCC Rcd. at 2616 ¶ 150 (the economics of deploying loops are determined by the costs associated with such deployment and the potential revenues that can be recouped from a particular customer location"); at 2619 ¶ 154 (CLECs building competitive networks "target areas that offer the greatest demand for high-capacity offerings (i.e. that maximize potential revenues)"; See also *TRO*, 18 FCC Rcd. at 17032, ¶ 77, (competitor's decision to enter the market "depends on whether the revenues it expects to obtain exceed the costs of entering and serving the market").

given that if the customer in a single tenant building were to switch its provider to the ILEC, the investment would be stranded since no other customers exist at the same location.⁶⁵

Cable companies generally do not serve these locations because they are in rural and suburban commercial areas and not adjacent to their core residential service areas, nor are their services tailored for these customers. In any event, the Commission has found that an ILEC and cable company duopoly is insufficient to warrant forbearance from legacy unbundling obligations.⁶⁶ The limited demand at these locations means that it is not economically feasible for competitors to deploy fiber or other facilities. Nor is there record evidence of significant competition with the ILECs for the wholesale products that CLECs use to serve their customer base. As the Commission found, where the ILEC “was the sole provider of wholesale facilities and services, there is no reason to expect it to offer such services at ‘competitive’ rates.”⁶⁷ As a result of these marketplace realities, Section 251(c) continues to be necessary to ensure consumers have a competitive alternative to ILEC services and competitive rates in the relevant markets and thereby ensure that ILEC rates, charges, classifications, and regulations are just and reasonable and not unjustly or unreasonably discriminatory.

Because of the lack of alternative facilities and the ILECs’ refusal to compete for voice services outside of their incumbent territories, those business customers seeking to consolidate their low volume POTS needs at disparate locations with a single carrier are dependent on CLECs, like the members of the Coalition, to provide nationwide multi-location telecommunica-

⁶⁵ See *TRRO* at 2617, ¶ 152 (“because a loop serves a specific location and cannot economically be transferred to serve another customer location, most of the costs of constructing loops are sunk... Unless the loop is subsequently [used]... to serve that same location, a carrier’s ability to recover the cost of that loop is ...wholly tied to the carrier’s ability to maintain service to a specific customer”).

⁶⁶ *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. at 8637, ¶ 30.

⁶⁷ *Id.* at 8640, ¶ 34.

tions services. And in turn, the members of the Coalition are dependent on the ILEC for reasonably-priced wholesale inputs necessary to serve these customers, which rarely require high-capacity network services.

The lack of alternative wholesale suppliers in most of the areas where the members of the Wholesale Voice Line Coalition rely on ILEC wholesale inputs means that the absence of a compulsory requirement to provide unbundled loops and resale would, as the Commission has noted, allow ILECs “to turn off legacy services, [leaving] competitive carriers [to] face the prospect of having *no access to critical inputs*, at least not on reasonable terms and conditions—preventing them from continuing to provide competitive alternatives to small- and medium-sized businesses.

IV. Unbundling and Resale Are Vital to Protecting Consumers

USTelecom asserts that removing the remaining unbundling and resale obligations will advance fiber deployment and development of next-generation services.⁶⁸ As described above in Section III, however, POTS customers are unlikely to see any such accelerated fiber deployment in any meaningful period of time. There is no economic rationale for deploying fiber to many of these locations especially those single customer locations with demand for four or less lines. And USTelecom’s petition is devoid of the kind of granular analysis necessary to grant such forbearance. Indeed, USTelecom concedes that while competition is a preferable mechanism to regulation, such reliance on competition requires that competition be “feasible.” The Coalition has amply demonstrated why USTelecom’s promise of competition from facilities deployment simply does not apply to the POTS market.

⁶⁸ USTelecom Petition at 32.

A. Unbundling and Resale Protect POTS Customers in the Distributed Multi-Line Business Market

Despite USTelecom's claims to the contrary, resale — in addition to UNE loops — remains a critical tool for Coalition members that provide the only competition to ILECs for multi-location business customers using a small number of POTS lines. While resold lines are a small fraction of the fixed end user retail connections,⁶⁹ the loss of resale will have a material adverse impact on businesses whose only means of access to competitive POTS service is via resale.

USTelecom argues that the loss of the resale discount under Section 251(c)(4) will not harm consumers because all local exchange carriers must provide non-discriminatory resold services under Section 251(b)(1). The Petition claims that the wireless market serves as a model for post-251(c)(4) resale because resale of mobile wireless remains vibrant despite deregulation.

Comparing the mobile wireless market to the POTS market, however, would be arbitrary and capricious. The national wireless market is currently competitive as there are four national providers that compete everywhere using their own facilities, in addition to some regional providers. No such competition exists in the POTS market where the ILEC is the only facilities-based carrier at many locations.

Nor is VoIP a reliable substitute. Indeed, many customers still demand POTS, because of the reliability of a copper network connection that self-supplies power. Customers that require alarm and fax lines or emergency phone lines for elevators will not rely on VoIP or other IP-based alternatives and still demand — or are required by law — to use POTS.

And at the locations where there is no alternative facilities-based provider to the ILEC, reliance on VoIP to discipline ILEC exclusionary conduct is misplaced since the VoIP must ride over a broadband pipe owned and controlled by the ILEC, who of course can impose exclusion-

⁶⁹ *Id.* at 29.

ary terms on the provision of broadband, thereby impeding competition.

Freed from regulation of their wholesale rates, and any obligation to offer UNEs and Re-sale under 251(c), ILECs will deny CLECs access to bottleneck loop facilities or raise CLECs' costs, thereby enhancing the ILEC's prospects of attracting CLEC customers to ILEC services. Consistent with basic competition theory, the Commission "has long recognized that a vertically integrated firm with market power in one market--here upstream wholesale markets where, ... [the ILEC] remains dominant--may have the incentive and ability to discriminate against rivals in downstream retail markets or raise rivals' costs" with the goal of "foreclos[ing] competitors from the market altogether."⁷⁰ Absent the unbundling obligations that currently exist, these SMB and CBO customers would have only one, or potentially two service providers.

This is no surprise, as the Commission has observed: "there is little evidence ... that the BOCs or ILECs have voluntarily offered wholesale services at competitive prices once regulatory requirements governing wholesale prices were eliminated."⁷¹ Absent continued Section 251 unbundling obligations, ILECs are unlikely to offer any competitively priced wholesale substitutes. If ILECs are permitted to eliminate their wholesale UNE loop offerings without providing comparably priced replacements (about which no details have been provided), the types of business and community customers served by CLEC will be forced to pay higher prices for the broadband services they currently use, settle for inferior service at the same rate, or lose service altogether. If CLECs are forced to raise prices, ILECs can either raise their prices, or use the price differential to lure customers away from CLECs. Once CLECs have left these markets

⁷⁰ *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. at 8639, ¶ 34.

⁷¹ *Id.* at 8640, ¶ 34, n.105.

because of their inability to offer competitively priced products, ILECs will have free rein to raise prices above competitive levels.⁷² These supra-competitive prices will harm consumers.

B. Unbundling and Resale Protect Residential POTS Consumers

Residential consumers also benefit from the competition CLECs provide using Section 251(c) unbundling and resale. USTelecom's sweeping assertions regarding competition from cable and residential consumer migration from POTS to VoIP are simply not accurate in every market, and its proposed forbearance relief would harm consumers, typically poor and low-income consumers in the urban markets that the cable and telephone incumbents have ignored.

Xchange, for example, serves thousands of residential customers in the New York City metropolitan area with POTS service using voice grade UNE loops connected to Xchange's own switch. These customers predominantly reside in low income neighborhoods, or in New York City Housing Authority buildings, where service from the cable incumbent is poor or not available. And Verizon, while touting the availability of FiOS, has not deployed FiOS to these neighborhoods.

Xchange's UNE-L customers are typically not interested in a triple play of broadband, voice and video. They simply want reliable telephone service. Such services are too expensive and far beyond their needs or their means. Elimination of unbundling will ultimately lead to price increases on these consumers who simply cannot justify the additional expense.

Of course simply because the ILECs promise they will deploy fiber does not actually mean they will follow through. According to New York City, under the franchise agreement it reached with Verizon that permitted Verizon to deploy FiOS and provide video service, Verizon was required to bring fiber to every customer in New York City by June 2014. Nearly one

⁷² See *id.* at 8637, ¶ 30.

million of the City's 3.1 million households, however, lack access to FiOS. The city brought suit to enforce its agreement with Verizon.⁷³

And even in the parts of the New York City Metropolitan area where Verizon has deployed fiber and makes FiOS available, not every consumer wants or can afford Verizon's FiOS triple play. Indeed, where Verizon has deployed FiOS in the NYC Metro area, it will not allow residential customers to obtain stand-alone voice service, as Verizon requires consumers served by FiOS to purchase a bundle including at least video or Internet Access in order to obtain home phone service.⁷⁴ For such customers, access to Xchange's UNE-L based service provides an affordable competitive alternative to Verizon's expensive FiOS service that is not always needed or wanted.

For these and similarly situated customers USTelecom's proposed forbearance will enable result in an automatic price increase as they will have no alternative for landline service other than purchasing Verizon's FiOS double or triple play. And VoIP, despite USTelecom's claims, is no substitute, since these customers typically eschew internet access in the first place.

V. Retaining Section 251's Unbundling and Resale Requirements is Consistent with the Public Interest

Retaining the resale and unbundling provisions of Section 251(c) is in the public interest because the availability of resale and UNEs disciplines the ILEC offering of other services in markets whether they continue to exercise their considerable market power. The Commission has long relied on the regulatory backstop provided by section 251 unbundling and resale to justify prior regulatory relief. It would be arbitrary and capricious for the Commission to now remove

⁷³ See *City of New York v. Verizon New York, Inc. and Verizon Communications Inc.*, City of New York Mot. for Summary Judgement, Index No. 450660/2017, (filed July 19, 2017 N.Y.Sup.Ct.)

⁷⁴ See Exhibit 1.

the last viable check on ILEC market power in those markets where ILECs exercise market power.

A. The Availability of UNEs Disciplines ILEC Rates

The Commission has found that the availability of UNEs disciplines ILEC rate and non-rate terms.⁷⁵ It would be arbitrary and capricious to end ILECs' few remaining section 251 legacy loop unbundling obligations after the Commission has repeatedly relied on the availability of UNEs to justify prior forbearance and regulatory reforms. One year ago, the Commission relied on the "medium term" of "several years" to ensure that ILEC BDS rates would remain just and reasonable after regulation. As the Commission found, "the use of UNEs, where available, allow competitors to effectively compete in lower bandwidth services."⁷⁶ Without continued loop unbundling obligations, there will be no UNE competition on which the BDS findings rely.

The *BDS Order* found that continued rate regulation was necessary to ensure just and reasonable special access rates in counties that were deemed not competitive. In these counties, the Commission predicted that "there is a substantial likelihood that competition will fail to ensure just and reasonable rates."⁷⁷ It would be arbitrary and capricious for the Commission to find sufficient competition for the purposes of UNE forbearance in the same counties deemed not competitive for BDS. In non-competitive counties, UNE obligations should be retained to impose price discipline on ILEC retail rates.

The *BDS Order* is not the only time the Commission relied on UNEs to ensure just and reasonable rates. In its *Enterprise Broadband Order*, the Commission found that in addition to deploying their own OCN facilities or utilizing rate regulated TDM-based, DS1 and DS3 special

⁷⁵ *TRRO*, 25 FCC Rcd. at 2575, ¶ 65.

⁷⁶ *BDS Order*, 32 FCC Rcd. at 3476, ¶ 32.

⁷⁷ *Id.* at 3503, ¶ 96.

access services (which after the *BDS Order* are largely unregulated), potential AT&T competitors had the option to use Section 251 UNEs as wholesale inputs for their enterprise broadband services.⁷⁸ Likewise, the *Section 271 Broadband Forbearance Order* relied in part on competitors' continued access to Section 251 UNEs to compete with the ILECs' broadband services.⁷⁹ Similarly, forbearance in the *2015 USTelecom Forbearance Order* relied to a large extent on the existence of regulatory "backstops" in the form of Section 251 and other regulations⁸⁰ as well as a lack of evidence that competitors were relying on independent unbundling obligations in Section 271 in contrast to the unbundling requirements in Section 251.⁸¹ The only Section 251 obligation addressed in the *2015 USTelecom Forbearance Order* was the 64 kbps channel for voice primarily due to nominal demand for such channels. However, that forbearance was conditioned on the grandfathering of 64 kbps channels that were already in use.⁸² In contrast, there is continued and substantial competitor demand for the remaining UNE loops.

⁷⁸ *Enterprise Broadband Forbearance Order*, 22 FCC Rcd. at 18705, ¶ 20, n. 86; 22 FCC Rcd. at 18721-22, ¶ 25 (stating that even where competitors do not have the option of self-deploying facilities or purchasing inputs from carriers other than the ILEC, potential providers may rely on special access services purchased from the ILEC at rates subject to price regulation and excluded from forbearance).

⁷⁹ *Section 271 Broadband Forbearance Order*, 19 FCC Rcd. 21506, n. 68 (finding forbearance warranted despite lower levels of competition in the enterprise customer market from cable providers "[b]ecause [C]LECs can still obtain access to network elements under section 251 to serve business customers"). *See also*, 19 FCC Rcd. at 21508, ¶ 26 (noting that competitive LECs would still have access to other network elements after forbearance).

⁸⁰ *2015 USTelecom Forbearance Order*, 31 FCC Rcd. at 6169, ¶ 18 (expressing expectation that "the substantive section 251 obligations will continue to be enforced through interconnection agreements and complains filed under section 203 of the Communications Act).

⁸¹ *Id.* at 6173, ¶ 27 (stating that "there is ... no evidence in the record that competitors are providing services through unbundled loops, transport, or databases and signaling specifically available under the independent checklist obligations").

⁸² *Id.* at 6194, ¶ 66.

B. The Availability of Resale Disciplines ILEC Commercial Voice Line Platform Offerings

In the same manner UNEs discipline ILEC BDS pricing, the availability of resold POTS lines discipline ILEC platform services. As noted above, Coalition members use ILEC resold lines in a number of ways. Resold service is available to fill gaps when distributed multi-location business customers require service at locations where the ILEC does not offer a commercial voice platform agreement. For example, neither Frontier nor CenturyLink offer platform service in their legacy territories. Similarly, other ILECs offer postalized rates for their platform service making it non-competitive in markets where retail prices are lower. In such markets the availability of resale provides an opportunity to offer a more competitive price to consumers. But the availability of resale at regulated rates – established pursuant to the Commission’s pricing formula for 251(c)(4) resale, disciplines pricing for the platform.

In recent years, the ILECs have fairly unfirmly ratcheted up prices for commercial platform service since the bulk of these services are used in markets and at locations where competitive alternatives are largely absent. Nonetheless, 251(c)(4) resale provides an effective backstop on price increases, as higher platform prices decrease the spread between the platform and resale making resale.

VI. The USTelecom/Windstream Transition Plan Harms Consumers and Competition

The Commission should not forbear from ILECs’ unbundling obligations. If it nevertheless finds that certain limited product and geographic markets qualify for such forbearance, however, it should reject USTelecom’s proposed transition measures.

A. The Petition is Silent Regarding Replacement Services

The Petition is bereft of any explanation of what services ILECs will offer to replace the voice and broadband services CLECs supply to millions of customers using UNEs and resale.

The Petition provides no guarantee that DS0 loops or a replacement product will be offered on an unbundled basis following forbearance. The Commission cannot grant forbearance absent such a showing. If USTelecom wants unbundling relief for its ILEC members it must identify the commercial services and prices that its members plan to make available in the event that forbearance is granted.

The Commission cannot evaluate the impact of the loss of UNE-based competition on consumers without details about the inputs that will be available to CLECs post-forbearance. It would be arbitrary and capricious for the Commission to adopt forbearance using USTelecom's wait-and-see approach, and it fails to satisfy USTelecom's burden to provide "convincing evidence and analysis" that the unbundling and resale rules are no longer necessary to ensure just and reasonable rates.

This is an untenable proposition for CLECs and their customers who may be forced to make substantial new and uneconomical investments or discontinue service as a result of the loss of UNEs. The Commission has an opportunity to ensure that technology transitions continue to benefit end-user customers (whether residential or business customers located in rural, suburban, or urban areas) and the economy at large by preserving a critical Section 251 market-entry framework that Congress adopted and the Commission implemented. It is imperative that USTelecom present their plans to regulators and competitors that rely on UNEs to compete before the Commission grants any forbearance from the obligations upon which competition in local markets has been able to grow for over two decades.

The so-called "compromise" with Windstream did not extend the transition period for CLECs to find substitutes for their embedded base of UNEs –Under the so called compromise, competitors would still be prohibited from ordering additional UNEs to serve existing customers

on the effective date of the order. And if the FCC takes the full 15 months to act (Aug. 2019), US Telecom's original 18-month transition proposal would have ended in February 2021, the same date as the so-called compromise.

USTelecom's proposed transition is inadequate to continue the rate pressure UNE-based competition places on incumbents' rates. Following the date of grant, competitors could not order replacement UNEs to continue serving, or upgrade services to, existing customers.

B. Customers Should Not Forfeit Their Right to Manage Their Business Technology

Ending CLECs' ability to order new or additional UNEs would harm customers and competition. Assuming the Commission were to grant the Petition (though it should not), CLEC customers might not be able to increase their bandwidth, add additional services, or rectify service problems caused by failures in the copper loops provisioned as of the order's effective date. In short, such restrictions will harm consumers by restricting their ability to run their businesses in a sensible way. Denying customers the opportunity to increase bandwidth or add new lines of service harms customers by interfering with their existing services and harms competition by putting CLEC (and other similarly situated competitors) at a competitive disadvantage in continuing to serve existing customers. The transition away from legacy unbundling obligations would cause unnecessary rate increases through unconstrained increases in wholesale input prices, in particular for customers lacking viable alternatives.

The Petition proposes no commercial replacement services and the Commission has found that BDS are inadequate substitutes for UNE loops.⁸³ With no access to UNEs or reasonable replacements, CLECs would be at a disadvantage in the market as of the day after the grant of forbearance. Absent UNE-based competition, ILECs would be free to raise rates with impuni-

⁸³ *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. at 8640, ¶ 35.

ty as USTelecom has not identified the geographic markets where customers can obtain facilities-based service from non-ILEC providers of broadband and TDM phone services. USTelecom has failed to demonstrate how ILEC rates will remain just and reasonable given the loss of competition.

C. An Eighteen Month Transition is Inconsistent with Recent Transition Periods

Should the Commission move forward and grant the Petition, a longer transition period would be necessary to provide the industry and broadband customers with certainty and sufficient time to adapt to a changed regulatory landscape. In comparison, the *BDS Order* adopted a 36-month transition period for carriers to adjust to the new detariffing regime.⁸⁴ It would be arbitrary and capricious to refuse to adopt a similar 36-month transition period for carriers adjusting to the end of the fundamental market-opening obligations imposed by Congress in Section 251(c).

VII. Conclusion

For the reasons discussed in this Opposition, the Commission should deny USTelecom's Petition for Forbearance.

⁸⁴ *BDS Order*, 32 FCC Rcd. at 3533, ¶ 167.

Respectfully submitted,

/s/ Joshua M. Bobeck

Andrew D. Lipman
Joshua M. Bobeck
MORGAN LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004-2541
202.739.3000 (tel)
202.739.3001 (fax)
Andrew.lipman@morganlewis.com
joshua.bobek@morganlewis.com

*Counsel for Access Point Inc.; BullsEye
Telecom, Inc.; Matrix Telecom, LLC dba
Impact Telecom; New Horizon Communica-
tions Corp.; and Xchange Telecom LLC*

Dated: August 6, 2018

EXHIBIT 1



Better Browsing

Details >

Better Streaming
*not eligible for TV or
phone bundles

Details >

Better Everything

Details >

Help me choose >



Add TV



Add Phone



Contract



Please pick your service before you checkout >

Checkout



Karson: Thank you!

Karson: Please allow me a few moments to check

Karson: I checked that this location has Fios and with Fios it is required to have atleast T.V or internet or any one of them to order home phone

Karson: Here you cannot order just home phone. I am sorry

You: ok thank you